

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
TERRENCE NESMITH,

Petitioner,

-against-

MARK D. BRADT, Superintendent,

Respondent.  
-----X

08 Civ. 6546 (SHS)

ORDER

SIDNEY H. STEIN, U.S. District Judge.

Terrence Nesmith brings this petition pursuant to 28 U.S.C. § 2254 alleging that his confinement by the State of New York is unlawful because (1) the trial court erred in instructing the jury on first degree manslaughter as a lesser included offense of second degree murder, and thus violated due process; (2) the trial court improperly permitted the introduction of three separate dying declarations made to police officers; and (3) the prosecution withheld exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). In a Report and Recommendation dated October 5, 2009, Magistrate Judge Kevin Nathaniel Fox concluded that Mr. Nesmith was not entitled to habeas relief on any of these grounds and that the petition should be denied in all respects. Mr. Reyes filed a timely objection to the Report and Recommendation on January 15, 2010.

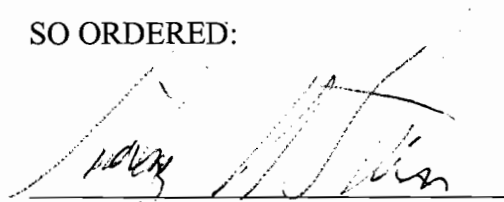
Upon de novo review of Judge Fox's Report and Recommendation dated October 5, 2009 and of petitioner's objections dated January 15, 2010, the Court adopts the findings and conclusions of the Report and Recommendation, with the single exception of noting that Mr. Nesmith was arrested on March 19, 2003, rather than March 19, 2002 as indicated in the Report. (See Trial Transcript dated Nov. 21, 2008 at 4:3.)

Accordingly, IT IS HEREBY ORDERED that:

1. Magistrate Judge Fox's Report and Recommendation is adopted;
2. The petition pursuant to 28 U.S.C. § 2254 is dismissed;
3. As petitioner has not made a substantial showing of the denial of a constitutional right, a certificate of appealability will not issue. 28 U.S.C. § 2253; *see also Richardson v. Greene*, 497 F.3d 212, 217 (2d Cir. 2007); and
4. Pursuant to 28 U.S.C. § 1915(a), the Court certifies that any appeal from this Order would not be taken in good faith.

Dated: New York, New York  
February 9, 2010

SO ORDERED:



Sidney H. Stein, U.S.D.J.